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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 477.

JOHN P. O'CONNOR,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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To the Supreme Court of the State of Ohio.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and Associate Justices of the United States Supreme Court:

Petitioner, John P. O'Connor, prays that writ of certiorari issue to review his conviction for larceny by the Supreme Court of the State of Ohio entered on May 25, 1966.

The Supreme Court of the United States, on an earlier application for re-hearing by Petitioner, for certiorari, in *O'Connor v. Ohio,* 15 L. ed. 2d 337 (No. 281 Misc.), granted the writ, vacated the judgment and remanded the case to the Supreme Court of the State of Ohio for further consideration in light of *Griffin v. Calif.*, 380 U. S. 609, 14 L. ed. 2d 106, 85 Supreme Court 1229. Upon remand, the Supreme Court of the State of Ohio by a 4-3 decision found that the *Griffin* case was not controlling and reaffirmed Petitioner's conviction. 6 Ohio State 2d 169 (1966).

OPINIONS BELOW.

The Court of Appeals for the Sixth District in Lucas County, Ohio, did not render a written opinion. Its journal entry is contained in the appendix at page 41.

The majority opinion of the Supreme Court of Ohio, by a 4-3 vote, written by the Hon. Kingsley Taft, Chief Justice, and concurred in by the Hon. Charles B. Zimmerman, Hon. John M. Matthias and Hon. Louis J. Schneider, Judges, is contained in the appendix hereto, pages 21 to 29 and reported in 6 Ohio St. 2d 169. A copy of the dissenting opinion written by the Hon. C. William O'Neill and concurred in by the Hon. Paul J. Herbert and Hon. Paul W. Brown is contained in the appendix hereto, pages 30 to 40, 6 Ohio St. 2d 176 to 184. The journal issued by the Supreme Court of Ohio on May 25, 1966 reads as follows:

> "The State of Ohio,
> City of Columbus,
> 1966 TERM, Towit: Wednesday, May 25, 1966
> No. 39119
> State of Ohio,
> *Plaintiff-Appellee,*
> vs.
> John P. O'Connor,
> *Defendant-Appellant.*
>
> APPEAL FROM THE COURT OF APPEALS FOR LUCAS COUNTY.
>
> "Thereupon this cause came on for further consideration of the opinion of The Supreme Court of the United States. On consideration whereof, it is ordered and adjudged that the judgment of this Court dismissing the appeal by no substantial constitutional question being involved, be and the same

hereby is vacated and set aside and it is now ordered and adjudged that the judgment of the Court of Appeals is affirmed in accordance with the opinion of the Supreme Court of the United States.

"It is ordered and adjudged also that the appellee recover from the appellant his costs as taxed on the Mandate from the Supreme Court of the United States and his costs expended in this Court, the Court of Appeals and Court of Common Pleas shall abide the final judgment; that a mandate be sent to the Court of Common Pleas of Lucas County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals, Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing entry was correctly copied from the records of said Court, to-wit from Journal No. ___, Page ___.

"IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 25th day of May, 1966.

THOMAS L. STARTZMAN, *Clerk.*"

(See Appendix page 42.)

Petitioner's application for re-hearing in the Supreme Court of Ohio was denied on June 15, 1966; said judgment affirmed Petitioner's conviction for larceny and his sentence to from one to seven years imprisonment and to pay costs of prosecution under Revised Code of Ohio, Section 2907.20 which states:

"No person shall steal anything of value. Whoever violates this section is guilty of larceny, and if the value of the thing stolen is sixty dollars or more, shall be imprisoned not less than one nor more than seven years. If the value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both."

The entry denying Petitioner's re-hearing in the Supreme Court of Ohio is contained in the appendix, page 43.

JURISDICTION.

1. The written opinion and dissenting opinion of the Supreme Court of Ohio was announced on May 25, 1966, *infra,* pages 21 to 40, and the Journal Entry of May 25, 1966, is contained in appendix, page 42, and the mandate of May 25, 1966 is contained in appendix, page 43.

2. The notice of appeal to this Court was filed in the Ohio Supreme Court on June 30, 1966 from the decision of the Supreme Court of Ohio on May 25, 1966; its re-hearing decision on June 15, 1966, is contained in the appendix, page 43.

3. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1257 (3).

4. Petitioner filed an application for stay of execution of sentence on June 23, 1966 in the State of Ohio Supreme Court and the Hon. Kingsley A. Taft, Chief Justice, on the 23rd of June, 1966, issued a stay for twenty days to enable counsel to apply to the Supreme Court of the United States for an indefinite stay of execution during Petitioner's appeal.

5. Petitioner, on the 30th day of June, 1966, filed an application for stay of execution of sentence in the Supreme Court of the United States and on the 12th day of July, 1966, Hon. William J. Brennan, Jr., granted the stay of execution of sentence. Copy of said order is contained in appendix, page 44.

6. Petitioner, on the 18th day of July, 1966, forwarded to the Supreme Court of Ohio, a new bond in the amount of $2500.00; said bond was approved and filed by

the Supreme Court of the State of Ohio on the 20th day of July, 1966. Copy of said order is contained in appendix, page 45.

7. Therefore, Petitioner is free from imprisonment and is under bond, pending this appeal, per order of the United States Supreme Court.

QUESTION PRESENTED.

1. The question raised by this appeal, as stated by the Hon. C. William O'Neill in his dissenting opinion in *State v. O'Connor, supra,* on page 176, is:

> "* * * whether this defendant, whose trial and appeal to the Court of Appeals, to this Court and to the United States Supreme Court occurred before the announcement of Griffin v. California, supra, by the United States Supreme Court, is entitled to the benefit of the rule established in that case, even though he did not raise the question until his petition for rehearing in the United States Supreme Court."

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

CONSTITUTION OF THE UNITED STATES.

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO.

Article I, Section 10:

No person shall be compelled, in any criminal case to be a witness against himself but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel.

Section 2945.43. Revised Code of Ohio:

On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.

STATEMENT OF FACTS.

John P. O'Connor on *January 9, 1964* was convicted in the Common Pleas Court of Lucas County, Ohio, for larceny under Section 2907.20 Revised Code of Ohio. At his trial the Court charged the jury as follows:

> "The Constitution of Ohio provides that no person shall be compelled to be a witness against himself; but his failure to testify may be considered and may be the subject of comment by counsel. You may consider the failure of the defendant to testify and you may attach to such failure whatever significance, if any, you believe reasonable under all the evidence." (T. 51-52.)

The prosecutor in his remarks to the jury commented on the failure of the defendant to take the witness stand and to testify. Likewise, in preparing his brief, in both the Court of Appeals for the Ohio Appellate Court (p. 8) and his further brief for the Supreme Court of the State of Ohio (p. 6) the prosecutor representing the State of Ohio stated that the defendant-petitioner here did not present any evidence on his own behalf.

Defendant-Petitioner prepared and had filed in the Court of Appeals his Assignment of Error and Brief on the 15th day of May, 1964, one full month prior to the decision rendered on June 15, 1964 by the United States Supreme Court in *Malloy vs. Hogan, Sheriff*, 378 U. S. 1, contrary to the statement set forth in the majority opinion of the Supreme Court of the State of Ohio in *State v. O'Connor, supra,* on page 175 of said opinion which is herein quoted:

> "The defendant in the instant case did not do this (raise the question of being prejudiced by the comment or instruction on the failure to testify) although his case was not submitted to the Court of Appeals

for decision until a substantial time after the decision in Malloy v. Hogan."

That conviction was affirmed without opinion by the Court of Appeals, Lucas County, Ohio, on *July 29, 1964.* The Supreme Court of Ohio, on *December 16, 1964,* dismissed defendant's claimed right of appeal on the ground that no substantial constitutional question was involved and denied defendant's motion for leave to appeal. A Petition for Re-hearing was denied by the Ohio Supreme Court on *January 20, 1965.*

Petitioner filed a notice of appeal to the United States Supreme Court on *April 15, 1965,* and on *October 11, 1965,* the Supreme Court of the United States denied the writ of certiorari.

Petitioner in his petition for re-hearing in the United States Supreme Court filed on *October 29, 1965,* complied with Paragraph No. 2 of Rule 57 of the Supreme Court of the United States which says that any petition filed under said Paragraph No. 2 must briefly and distinctly state the grounds for such petition. These grounds are confined to *intervening circumstances of substantial or controlling effect,* or to other substantial grounds available to petitioner although not previously presented.

John P. O'Connor asserted that he was entitled to benefit of the rule established in *Griffin v. California,* 380 U. S. 609, *April 28, 1965,* and his rights under the State of Ohio and U. S. Constitutions even though he did not raise the question under the *Griffin* rule until his petition for re-hearing in the United States Supreme Court, as *Griffin v. California, supra,* was announced on *April 28, 1965,* and Petitioner's original appeal in the United States Supreme Court was dated *April 15, 1965,* two weeks prior to *Griffin, supra.*

The Petitioner stating that he was denied his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution by reason of the trial judge's charge to the jury and the prosecutor's comment on his failure to testify to the jury, with the prosecutor raising this question in his Court of Appeals and Supreme Court of Ohio briefs.

The Supreme Court of the United States on December 13, 1965, in *O'Connor v. Ohio,* 15 L. ed. 2d 337 (No. 281, Misc.), made the following order:

"Per Curiam.

The petition for re-hearing is granted and the order of October 11, 1965, insofar as it denies certiorari, is vacated. Treating the papers as a petition for a writ of certiorari, certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Ohio for further proceedings in light of Griffin v. California, 380 U S 609, 14 L ed 2d 106, 85 S Ct 1229."

Subsequent to the order and remand of December 13, 1965, from the Supreme Court of the United States, the Supreme Court of Ohio after oral argument of counsel, by a 4-3 decision, with the majority opinion written by Chief Justice Kingsley Taft, and the minority opinion written by Hon. C. William O'Neill, Judge, on May 25, 1966, in *State v. O'Connor, supra,* 6 Ohio St. 2d 169, states in Syllabus No. 1:

"The Supreme Court may properly refuse to consider a claim of error that was not raised in any way in the trial court or in the Court of Appeals and was not considered or decided by the Court of Appeals."

The Supreme Court of Ohio issued its mandate on May 25, 1966, *infra,* p. 43.

Said mandate affirmed Petitioner's conviction for larceny in the Court of Appeals of Lucas County, Ohio.

Petition for re-hearing was filed in the Supreme Court of Ohio on June 2, 1966, and was overruled on June 15, 1966.

Petitioner filed a notice of appeal to the Supreme Court of the United States on June 30, 1966, and is now free on bond, per order of Hon. William J. Brennan, Jr., of this Court issued on July 12, 1966, *infra*, p. 44.

ARGUMENT.

Certiorari should be granted herein because the United States Supreme Court on December 13, 1965 in *O'Connor v. Ohio, supra,* vacated Petitioner's judgment of conviction and remanded this cause to the Supreme Court of Ohio for "further proceedings in light of Griffin v. California, supra," and on May 25, 1966, the Supreme Court of Ohio by a 4-3 decision affirmed Petitioner's conviction irrespective of the mandate issued by the Supreme Court of the United States to the Supreme Court of Ohio in *O'Connor v. Ohio, supra;* said decision does not give Petitioner the benefit of the rule of *Griffin v. California, supra.*

Petitioner again asserts that he is entitled to the benefit of the rule established in *Griffin v. California,* 380 U. S. 609, and his rights under the State of Ohio and the United States Constitutions, even though he did not raise the question under the *Griffin* rule until his petition for rehearing in the United States Supreme Court, as *Griffin v. California, supra,* was announced on *April 28, 1965,* and Petitioner's original appeal in the United States Supreme Court was dated *April 15, 1965,* two weeks prior to *Griffin, supra.*

There is a conflict between the decision rendered below by the Supreme Court of Ohio by a 4-3 vote in *State v. O'Connor,* 6 Ohio St. 2d 169, on May 25, 1966, upon remand of the case by the Supreme Court of the United States and this Court's decision in *O'Connor v. Ohio,* 15 L. ed. 2d 337, December 13, 1965, and the rule stated by Hon. Justice Stewart in *Tehan, Sheriff v. United States ex rel. Shott,* 15 L. ed. 2d 453, January 18, 1966, that the *Griffin* case should be applied to cases pending on direct appeal at the time of the *Griffin* decision. The applicability of the *Griffin* rule to this case may be seen by Justice Stewart's specific reference to the *O'Connor* case in *Tehan, supra,* footnote No. 3, where it was stated: "* * * nor is there any question of the applicability of the Griffin rule to cases still pending on direct review at the time it was announced." Cf. *O'Connor v. Ohio,* 15 L. ed. 2d 337.

Malloy v. Hogan was announced by the United States Supreme Court on *June 15, 1964,* and the Supreme Court in Headnote No. 2 states, 378 U. S. 1:

> "Constitutional Law—due process—self incrimination.
>
> 2. The Fifth Amendment privilege against self-incrimination is protected by the Fourteenth Amendment against abridgment by the states."

Even Judge Taft in his majority opinion, *State v. O'Connor,* 6 Ohio St. 2d 169, at page 173 in said opinion said:

> "Undoubtedly, the trial court erred in the instant case in charging upon defendant's failure to testify."

Undoubtedly, the trial court's charge to the jury carried even greater weight in the minds of the jury than the remarks of the prosecuting attorney upon the failure of Petitioner to testify in his own behalf.

Prior to *Griffin v. California* (*Twining v. New Jersey*, 211 U. S. 78), under decisions of the United States Supreme Court it was not a denial of defendant's federal constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution for the trial court, in its charge to the jury in a criminal case, to comment upon the failure of a defendant to testify under Ohio Constitution, Article I, Section 10, which provides:

> "No person shall be compelled, in any criminal case to be a witness against himself but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains the same wording.

Prior to the decision of *Griffin v. California, supra,* which may have an effect on the Constitution of the State of Ohio, it had been proper and customary for years for the Court to give a charge similar to that quoted as the charge given in the case before this Court by the Trial Court. In fact, this type of charge is set forth in a four volume treatise on charges given to juries published by the late Judge Lehr Fess of the Sixth District Court of Appeals for the State of Ohio.

Following the initial publication of Judge Fess' four volume treatise, additions and changes in charges were added and subsequently a revision was completed and republished. However, even the republished and revised version of the recommended charge to the jury encompassed the type of charge given by the Trial Court in the cause herein sought to be reconsidered by the Supreme Court of the United States.

Judge O'Neill stated in his dissenting opinion in *State v. O'Connor, supra,* on page 180:

"Until Griffin was decided (April 28, 1965), the controlling law was a part of the Ohio Constitution and the question of substantive law presented by this case had been determined by the highest court of this state and supported by the United States Supreme Court. In Griffin, a new rule of substantive law was announced."

The United States Supreme Court by the rule of law announced in *Griffin, supra,* made invalid the part of the Ohio Constitution which made permissible to comment upon the failure of the defendant to testify and Revised Code of Ohio 2945.43 which also allowed adverse comment in a criminal case upon the defendant's failure to testify.

Headnote No. 3 of the *Griffin* case, *supra,* states:

"The Fifth Amendment, in its direct application to the federal government and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt; hence, a state may not validly apply to a state criminal prosecution a state constitutional provision that in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel; and may be considered by the court or the jury."

As Judge O'Neill so forcibly states in his dissenting opinion, in *State v. O'Connor, supra,* at pages 181 and 182:

"* * * In the case before this court, however, unlike any of those cases upon which the majority relies, the question of substantive law has already been determined by the United States Supreme Court and had not been changed in half a century before the trial. It would not have served a legitimate state

interest or public purpose to have required defense counsel in the trial of this case, where that trial took place 5½ months before Malloy, supra, was decided, to have objected to the court's charge, which was in accord with the Ohio Constitutional provision, Section 10, Article I, and which had been found by the United States Supreme Court not to deny any federal constitutional right of the defendant.

"Until Griffin was decided, it would not have served any legitimate state interest or any sound public purpose to have required defense counsel to have raised a question about this charge denying the defendant's federal constitutional rights under the Fifth and Fourteenth Amendments in the Court of Appeals, or in this court, for each of those courts would have been required to and would have followed the Ohio constitutional provision, Section 10, Article I. In fact, that point is not open to question because in State v. Howell, 4 Ohio St. 2d 11, this court held that there was no substantial constitutional question presented and disallowed the appeal. Howell, supra, was remanded to this court by the Supreme Court of the United States, and then reversed by this Court in accordance with Griffin, supra. In Howell, supra, this court announced the proper rule of law and the rule which should be followed in this case. * * *

"It may well be, as Taft, C.J. argues, that after Malloy, supra, was announced, which occurred at the time this case was pending in the state Court of Appeals, an astute lawyer would have anticipated the decision in Griffin, but to have raised this question based upon such an anticipation would have been a vain and meaningless gesture because the state court was bound by the state Constitution until the Supreme Court of the United States declared that that state constitutional provision denied a federal constitutional right of the defendant. No legitimate state interest or public purpose would be served by

requiring defendant to raise the question at that time in order to secure what the United States Supreme Court later determined was a federal constitutional right to which he was entitled."

Judge O'Neill continued: "For this Court to insist upon such a rule, which would require such an objection to be made at a time when, until Malloy, supra, the United States Supreme Court had held that no federal constitutional right of the defendant was abridged by the charge, would, as the United States Supreme Court said in Wright v. Georgia, 373 US 284, decided May 20, 1963, 'be to force resort to an arid ritual of meaningless form.' * * *"

Such a position cannot be justified on the basis of serving a legitimate state interest or on the basis of establishing a sound public policy when its only result is to deny to a defendant a federal constitutional right to which the United States Supreme Court has already determined that he is entitled as a matter of substantive law.

The present decision of the Supreme Court of Ohio conflicts with a previous decision of the Supreme Court of the United States in *LeRoy Henry and 64 others, Petitioners vs. City of Rock Hill,* 376 U. S. 776, 12 L. ed. 2d 79, 84 U. S. S. Ct. 1042, Headnote No. 1 stated:

"The remand of a case by the Supreme Court of the United States to a state court for reconsideration in light of an intervening decision by the Supreme Court does not amount to a final determination on the merits but indicates that the Supreme Court found the intervening decision sufficiently analogous and perhaps, decisive to compel re-examination of the case."

Headnote No. 2 states:

"A rule stated in a decision by the Supreme Court of the United States and based upon the Federal Constitution is binding upon the state courts as well as the federal courts."

There is a need for an orderly judicial administration of pending and related litigation. A further reason for this appeal of this case is to enable this Court to direct the orderly disposition of litigation pending from the various states. The inconsistency of the majority opinion of the Supreme Court of Ohio in *State v. O'Connor, supra,* may be seen from a number of Ohio cases on the point at law at issue in this case.

State v. Howell, 4 Ohio St. 2d 11 (Oct. 13, 1965) states:

> "Appeal from the Court of Appeals for Marion County. On Remand from the Supreme Court of the United States.
>
> "Defendant was convicted under Section 2905.10, Revised Code, of procuring a female under 17 for the purpose of prostitution, harboring her in a house of assignation and procuring her for intercourse with others. That conviction was affirmed by the Court of Appeals. This court dismissed defendant's claimed appeal as of right on the ground that no substantial constitutional question was involved and denied defendant's motion for leave to appeal.
>
> "The Supreme Court of the United States has vacated the judgment of this court and remanded the cause to this court 'for further consideration in light of Griffin v. California' (1965), 14 L. Ed. 2d 106.
>
> "Per Curiam. In Griffin, the Supreme Court of the United States held that 'comment' by the trial court and by the prosecutor "on the (defendant's) failure to testify violated the self-incrimination clause of the Fifth Amendment which we made applicable to the states by the Fourteenth," even though such comment was authorized by the provisions of the California Constitution.
>
> "In the instant case, the prosecutor's brief states:

'The defendant did not testify at the trial. The prosecuting attorney, in closing argument, commented on the defendant's failure to testify. The court referred to such fact in the charge to the jury.'

We are therefore required to reverse the judgment of conviction and remand the cause to the Common Pleas Court for a new trial.

Judgment reversed."

"Taft, C.J., Zimmerman, Matthias, O'Neill, Herbert, Schneider and Brown, J.J., concur."

The Ohio Supreme Court followed the *Griffin* rule on November 17, 1965, in *State v. Browning*, 38 Ohio BAR No. 45, 1256, as follows:

"State, Appellee, v. Charles Preston Browning, Appellant. Lucas County. Appeal from the Court of Appeals. Judgment reversed and cause remanded on authority of State v. Howell, 4 Ohio St. 2d 11 and Griffin v. California, 14 L ed 2d 106. Taft, C.J., Zimmerman, J.J., concur. 38 Ohio BAR, No. 20, Constitutional Law."

And on November 17, 1965, in *State v. Reed,* 38 Ohio BAR 45, 1256, as follows:

"State, Appellee v. Lindsay Reed, Appellant. Hamilton County. Appeal from the Court of Appeals. Judgment reversed and cause remanded on authority of State v. Howell, 4 Ohio St. 2d 11, and Griffin v. California, 14 L ed 2d 106. Taft, C.J., Zimmerman, Matthias, O'Neill, Herbert, Schneider and Brown, JJ., concur. 38 Ohio BAR, No. 18, Constitutional Law."

And, *State of Ohio v. Lynn, Illiacqua,* 5 Ohio St. 2d 106, February 9, 1966, Syllabus No. 1 states:

"Comment by the trial court or by the prosecutor upon the failure of an accused to testify in a criminal proceeding against him violates the self-incrimination clause of the Fifth Amendment made applicable to the

states by the Fourteenth Amendment. (United States Supreme Court in Griffin v. California, 14 L ed 2d 106.)"

Syllabus No. 2:

"The doctrine of the Griffin case is applicable to cases pending on appeal at the time of its pronouncement. (United States Supreme Court in Linkletter v. Walker, Warden, 14 L ed 2d, 601, construed.)"

Syllabus No. 4 states:

"Where there are errors of commission in the charge of a court, not induced by the complaining party, a failure to object thereto does not constitute a waiver of the error, and such error may be relied upon in an appeal of such case. (Rosenberry et al., Admrs., v. Chumney, 171 Ohio St. 49, followed.)"

And on page 108 of the above cited case, the Court stated:

"In other words, the application of a new rule of law to a pending appeal is not restrospective as that word is used in relation to the effect of a new decision on a pending case.

In this case, we are not concerned with a conviction which has become final prior to the adoption of the Griffin rule; the appeal from the original conviction was still pending at that time. We hold, therefore, that the Griffin rule is applicable to cases which were pending on appeal at the time of its announcement. (See Fahy v. Connecticut (1963) 375 US 85; Linkletter v. Walter, Warden (1965), 14 L ed 601; State v. Lanzo (1965), 44 N. J. 560.)"

Further conflict in the law of the State of Ohio may be seen in the case of the *State of Ohio v. McLeod,* 1 Ohio St. 2d 60, December 29, 1964, where Judge Gibson of the Ohio Supreme Court in his dissenting opinion states:

"History has a way of repeating itself. Twice within the past two years, the Supreme Court of the United

States has remanded cases for the purpose of giving this Court the opportunity to reverse itself rather than be reversed. In 1963, the case of Doughty v. Maxwell, 372 US 781, 10 L ed 2d 139, was remanded and in 1961 the case of McLeod v. Ohio, 84 S Ct 1922, decided June 22, 1964, was remanded."

The majority opinion of the Ohio Supreme Court in *State of Ohio v. O'Connor, supra,* fails to consider previous rulings of the Supreme Court of the United States in the following cases which apply to O'Connor, *supra*:

Henry v. Mississippi, 379 U. S. 443, 13 L. ed. 2d 408, 85 S. Ct. 564, Hon. Justice Brennan states for the majority in 379 U. S. 447:

> "* * * we have consistently held that the question of when and how defaults in compliance with federal rules can preclude our consideration of a federal question in itself a federal question." * * *
>
> "* * * These cases settle the proposition that a litigant's procedural defaults in state proceedings to not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest * * *."

The facts in *State of Ohio v. O'Connor, supra,* bring it squarely within the rule of the *Griffin* case.

The Supreme Court of the United States decided in *Tehan, supra,* that *Griffin* should be applied to all cases pending on direct appeal at the time of the announcement of that decision and used the ruling of the United States Supreme Court in *O'Connor v. Ohio, supra,* as authority for that ruling.

CONCLUSION.

Petitioner contends that the affirming of his judgment of conviction by the Supreme Court of Ohio violates his rights as a citizen of the United States under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner respectfully requests that certiorari be granted and that his judgment of conviction be reversed.

Respectfully submitted,

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Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO, 6 OHIO ST. 2d 169.

THE STATE OF OHIO, APPELLEE, *v.* O'CONNOR, APPELLANT.

Appeal—Claim of error not raised in lower courts—Supreme Court may refuse to consider—Criminal procedure—Comment on defendant's refusal to testify.

The Supreme Court may properly refuse to consider a claim of error that was not raised in any way in the trial court or in the Court of Appeals and was not considered or decided by the Court of Appeals. (Paragraph six of the syllabus of *State* v. *Lynn,* 5 Ohio St. 2d 106, approved and followed.)

(No. 39119—Decided May 25, 1966.)

ON REMAND from the Supreme Court of the United States.

John P. O'Connor was convicted of larceny under Section 2907.20, Revised Code, in the Common Pleas Court of Lucas County on January 7, 1964. At his trial the court charged the jury as follows:

> "The Constitution of Ohio provides that no person shall be compelled to be a witness against himself; but his failure to testify may be considered and may be the subject of comment by counsel.
>
> "You may consider the failure of defendant to testify and you may attach to such failure whatever significance, if any, you believe reasonable under all the evidence."

From a judgment of conviction, the defendant appealed to the Court of Appeals, alleging as error the introduction, over objection, of evidence obtained as a result of an unreasonable search and seizure.

The Court of Appeals affirmed the judgment of the Common Pleas Court.

On September 16, 1964, defendant appealed to this Court. The only issue before this Court at that time was whether certain evidence was illegally seized and, therefore, improperly admitted at defendant's trial.

This Court overruled the defendant's motion for leave to appeal and dismissed the appeal on the ground that it presented no substantial constitutional question. *State v. O'Connor,* 177 Ohio St. 181. A motion for rehearing was denied.

On April 15, 1965, defendant appealed to the United States Supreme Court, basing his appeal only on this same search and seizure question.

On April 28, 1965, the United States Supreme Court decided *Griffin v. California,* 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, which held that a charge by the court and a comment by the prosecutor that the jury may consider the failure of a defendant to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge are a denial of the defendant's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

On October 11, 1965, the Supreme Court of the United States dismissed the defendant's appeal. The court treated the appeal papers in this case as a petition for a writ of certiorari and denied certiorari.

However, on December 13, 1965, certiorari was granted on defendant's petition for rehearing, in which it was asserted, for the first time in this case, that he had been denied his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution by reason of the judge's charge and the prosecutor's comment on his failure to testify.

The defendant had not raised this question at his trial or before any of the reviewing courts.

The United States Supreme Court vacated the judgment of this Court and remanded the cause to this Court for further consideration in the light of *Griffin v. California, supra.*

Mr. Harry Friberg, prosecuting attorney, and *Mr. Anthony Pizza,* for appellee.

Mr. James W. Cowell and *Mr. Raymond S. Metzger, Jr.,* for appellant.

TAFT, C.J. Shortly after the decision in *Griffin v. California, supra* (380 U. S. 609), this Court admitted for review all cases where the prosecutor had commented or the trial judge had charged upon a criminal defendant's failure to testify. Surprisingly, there were only five such cases. Thereafter, the Supreme Court of the United States remanded *Howell v. Ohio* (1965), 381 U. S. 275, 14 L. Ed. 2d 430, 85 S. Ct. 1457, "for further consideration in light of *Griffin v. California.*" This Court promptly reversed the judgment in that case (*State v. Howell* [1965], 4 Ohio St. 2d 11, 211 N. E. 2d 56) and ordered the prosecutor in each of the five cases previously admitted for review to specify whether there was any reason for not reversing without further argument on the authority of the *Griffin* and *Howell* cases. Because no such reason was advanced, the judgments in two of those cases were summarily reversed. *State v. Browning* (1965), 38 Ohio Bar, No. 45, 1256; *State v. Reed* (1965), 38 Ohio Bar, No. 45, 1256. Subsequently, a defendant in a third case withdrew his appeal to this Court. *State v. Lynn* (1966), 5 Ohio St. 2d 106, 107. The judgment against another defendant (Illacqua) was reversed on authority of *Griffin v. California, supra* (380 U. S. 609). *State v. Lynn, supra* (5 Ohio St. 2d 106). This Court, with no dissent noted, refused to reverse the judg-

ment against the fifth defendant (Conti) for the reason that the question, which is related to the question involved in and had no vitality whatever before *Griffin v. California, supra* (380 U. S. 609), was not raised by such defendant either at the trial or in the Court of Appeals. *State v. Lynn, supra* (5 Ohio St. 2d 106) (paragraph six of syllabus). A similar decision had been rendered in *City of Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22, where this Court stated in paragraph two of its syllabus that "the Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court." *Lynn* was decided by this Court after and with knowledge of the remand of the instant case.

Because of the decisions of the United States Supreme Court in *Griffin v. California, supra* (380 U. S. 609), and *Howell v. Ohio, supra* (381 U. S. 275), it is settled that, in a criminal case, a charge by the court and a comment by the prosecutor, that the jury may consider the failure of a defendant to testify as to matters which he can reasonably be expected to deny or explain because of facts within his knowledge, are a denial of the defendant's constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution. *Tehan, Sheriff, v. United States, ex rel. Shott* (1966), 15 L. Ed. 2d 453, 86 S. Ct. 459, determines that the law as declared in *Griffin v. California, supra* (380 U. S. 609), is applicable to all cases that were still pending on direct review at the time that *Griffin* was announced.

This brings us to the only question involved in the instant case. That question may be stated as follows:

May the Supreme Court of Ohio properly refuse to consider a claim of error that was not raised in any way in

the trial court or in the Court of Appeals and was not considered or decided by that court?

As hereinbefore stated, this Court recently held that it may. *City of Toledo v. Reasonover, supra* (5 Ohio St. 2d 22), and *State v. Lynn, supra* (5 Ohio St. 2d 106). See also *State v. Jones* (1965), 4 Ohio St. 2d 13, 211 N. E. 2d 198, and *State v. Davis* (1964), 1 Ohio St. 2d 28, 203 N. E. 2d 357.

The holdings in the *Reasonover* and *Lynn* cases accord with similar holdings made by courts of last resort in other states in similar circumstances. *State v. Friola* (1962), 11 N. Y. 2d 157, 182 N. E. 2d 100; *People v. West* (1963), 12 N. Y. 2d 1090, 190 N. E. 2d 532; *Shorey v. State* (1962), 227 Md. 385, 177 A. 2d 245, certiorari denied, 371 U. S. 928.

Such holdings also accord with the rules of the Supreme Court of the United States which are based upon the constitutional (Section 2, Article III) and statutory (Section 1257, Title 28, U. S. Code) provisions defining and limiting the appellate jurisdiction of that court. For example, in Rule 23, 1(f), of the Supreme Court, relative to petitions for certiorari, the petitioner is required to "show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari," and Rule 16, 1(b) provides that "the court will receive a motion to dismiss an appeal from a state court on the ground * * * that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

Those decisions further accord with the decisions of the Supreme Court of the United States. Thus, in footnote 9 of *Mapp v. Ohio* (1961), 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, it is stated:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

Examples of the respect given to state procedural requirements such as those recognized by this Court in the *Reasonover* and *Lynn* cases are found in *Edelman v. California* (1953), 344 U. S. 357, 97 L. Ed. 387, 73 S. Ct. 293; *Brown v. Allen, Warden* (1953), 344 U. S. 443, 486, 97 L. Ed. 469, 504, 73 S. Ct. 397, 422; *Michel v. Louisiana* (1955), 350 U. S. 91, 100 L. Ed. 83, 76 S. Ct. 158; *Parker v. Illinois* (1948), 333 U. S. 571, 92 L. Ed. 886, 68 S. Ct. 708; *Baldwin v. Kansas* (1889), 129 U. S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *Spies v. Illinois* (1887), 123 U. S. 131, 181, 31 L. Ed. 80, 91, 8 S. Ct. 21, 31; *Leeper v. Texas* (1891), 139 U. S. 462, 35 L. Ed. 225, 11 S. Ct. 577; *Duncan v. Missouri* (1894), 152 U. S. 377, 38 L. Ed. 485, 14 S. Ct. 570; and *Hartford Life Ins. Co. v. Johnson* (1919), 249 U. S. 490, 63 L. Ed. 722, 39 S. Ct. 336.

Undoubtedly, the trial court erred in the instant case in charging upon defendant's failure to testify.

There is nothing to indicate that the Supreme Court of the United States determined in *Tehan, Sheriff, v. United States, ex rel. Shott, supra* (15 L. Ed. 2d 458), that our court must hold that the trial court so erred, even though no such claim of error was raised either in the trial court or in the Court of Appeals and even though procedural due process in Ohio, as consistently recognized by our statutes and the decisions of this Court, contemplates that this Court should not even consider a claim of error not raised in any way in the Court of Appeals and not considered or decided by that court.

There is nothing to indicate that the Supreme Court of the United States knew, when it "remanded" this

case to this Court "for further proceedings in the light of *Griffin*," that defendant had not previously raised in the Ohio courts the contention now relied upon. Certainly, the fact, that defendant originally relied only upon some other claim of error before the Supreme Court of the United States, would not inform that court that that was the only claim of error relied upon by that defendant in the courts of Ohio. We all know that an appellant frequently does not raise in our court all the errors that he relied upon in his unsuccessful appeal to the Court of Appeals.

Defendant's application for rehearing expressly represented to the Supreme Court of the United States that the same ground as in *Howell v. Ohio, supra* (381 U. S. 275) (i.e. violation of constitutional rights by reason of the court's charge and comment of the prosecutor on the defendant's failure to testify), was available to the defendant in the instant case. That application further expressly represented that, so far as this ground is concerned, the two cases (the instant case and the *Howell* case) did not differ until the appeal to the Supreme Court of the United States. Admittedly, they did differ. In *Howell*, the question as to such charge of the court and comment of counsel was consistently raised from the time when such charge and comment were made. However, in the instant case, no question with respect to any such charge or comment was ever raised until after defendant's petition for certiorari had been denied by the Supreme Court of the United States.

There is nothing to indicate that this important difference between the instant case and the *Howell* case was ever called to the attention of or known by the Supreme Court of the United States when it remanded the instant case to this Court for further proceedings.

It is suggested that defendant should not be expected to raise the claim of error, now relied upon, before the Supreme Court of the United States had given it vitality by its decision in *Griffin*. We answered such a contention in *Reasonover* where, at page 25, we stated:

> "It may reasonably be argued that defendant should be excused from raising in the Court of Appeals his claim of error with respect to the prosecutor's comment on his failure to testify, because he could not reasonably anticipate such an unusual decision as *Griffin v. California, supra.* But see 5 *American Jurisprudence* 2d 29, Section 545.
>
> "However, as early as June 15, 1964, when *Malloy v. Hogan, Sheriff,* 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 was decided, there was considerable speculation among lawyers and laymen and in newspapers as to whether the Supreme Court would render a decision such as it later rendered in *Griffin.* Thereafter, any defendant who considered that he had been prejudiced by comment of the prosecutor on his failure to testify should have promptly raised that question. The defendant in the instant case did not do this although his case was not submitted to the Court of Appeals for decision until a substantial time after the decision in *Malloy.*"

See also *Sunal v. Large, Supt.* (1947), 332 U. S. 174, 91 L. Ed. 1982, 67 S. Ct. 1588.

It is not reasonable to infer from the brief memorandum opinion of the United States Supreme Court in the instant case that that court intended to depart from the law, as so recently stated in the court's opinion in *Edelman v. California, supra* (344 U. S. 357), as follows:

> "* * * We granted certiorari because of serious constitutional questions raised as to the validity of the vagrancy statute * * *. * * * it is necessary at the

outset to determine whether we have jurisdiction in this case.

"Petitioner contends, first, that his conviction violates the due process clause of the Fourteenth Amendment because the vagrancy statute is vague, indefinite and uncertain. The record indicates that this defense was not raised on trial but was presented for the first time as the fifth of petitioner's grounds of appeal * * *.

"It is clear that this court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. * * * Noncompliance with such local law can thus be an adequate state ground for a decision below. * * * It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us."

In our opinion, if the Supreme Court of the United States intended to make such an important departure from its long and consistent line of prior decisions, from the statutes governing its jurisdiction, and even from its own rules, the Supreme Court of the United States would have at least expressed its intention to do so.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

ZIMMERMAN, MATTHIAS and SCHNEIDER, JJ., concur.

O'NEILL, HERBERT and BROWN, JJ., dissent.

DISSENTING OPINION OF THE SUPREME COURT OF OHIO, 6 OHIO ST. 2d 176.

O'NEILL, *J.*, dissenting. This cause was remanded to this Court by the Supreme Court of the United States on December 13, 1965 (15 L. Ed. 2d 337), "for further proceedings in light of *Griffin v. California*, 380 U. S. 609."

The sole question presented by this case is whether this defendant, whose trial and appeal to the Court of Appeals, to this Court and to the United States Supreme Court occurred before the announcement of *Griffin v. California, supra*, by the United States Supreme Court, is entitled to the benefit of the rule established in that case, even though he did not raise the question until his petition for rehearing in the United States Supreme Court.

The rule to be followed in deciding this question was set forth by Mr. Justice Stewart in *Tehan, Sheriff, v. United States, ex rel. Shott*, 15 L. Ed. 2d 453, decided January 19, 1966. That was a federal habeas corpus case before the United States Supreme Court solely upon the issue of whether *Griffin* should be applied to a case where all rights of direct appeal had been exhausted prior to the announcement of *Griffin*. The court there held that the *Griffin* rule should not be applied retrospectively, but should be applied to cases pending on direct appeal at the time the decision in *Griffin* was announced.

This case falls squarely within that holding. Any doubt as to the applicability of the *Griffin* rule was dispelled by Mr. Justice Stewart in a specific reference to the case now before this Court in *Tehan, supra*, footnote 3, where he stated:

> "* * * Nor is there any question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced. Cf. *O'Connor v. Ohio* * * * [15 L. Ed. 2d 337]."

The majority refuses to accept this pronouncement of law by Mr. Justice Stewart, with specific reference to the case now before this court as being controlling, on the ground that Mr. Justice Stewart did not know or understand that defendant O'Connor first raised the question of adverse comment upon his failure to testify in his petition for rehearing before the United States Supreme Court.

After a careful reading of the record and the briefs filed both in this court and in the United States Supreme Court, and the opinions in *Griffin* and *Tehan, supra,* I find no basis for the position that the Justices of the Supreme Court of the United States did not know or understand that this question was raised for the first time in the petition for rehearing before that court. However, I am also of the opinion that the fact that this question was not raised until a motion for rehearing was made in the Supreme Court of the United States has no controlling relevance to the decision in this case, since the fact is that this case was pending on direct appeal in the United States Supreme Court when *Griffin, supra,* was announced.

Prior to the decision in *Griffin,* under decisions of the United States Supreme Court, it was not a denial of a defendant's federal constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution for the trial court, in its charge to the jury in a criminal case, to comment upon the failure of the defendant to testify pursuant to Section 10, Article I of the Ohio Constitution, which provides:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

The validity of a provision such as this one, which was adopted as a part of our Constitution in 1912, was established by the Supreme Court of the United States in *Twining v. New Jersey,* decided in 1908, 211 U. S. 78. Mr. Justice Stewart discussed *Twining* in his opinion in *Tehan, supra,* at 456, as follows:

> "* * * In that case the plaintiffs in error had been convicted by the New Jersey courts after a trial in which the judge had instructed the jury that it might draw an adverse inference from the defendants' failure to testify. The plaintiffs in error urged in this court two propositions: 'first, that the exemption from compulsory self-incrimination is guaranteed by the federal Constitution against impairment by the states; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar.' 211 U. S., at 91 * * *."

As Mr. Justice Stewart said in *Tehan, supra,* the Supreme Court in *Twining* "* * * held, explicitly and unambiguously, 'that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the federal Constitution.' 211 U. S., at 114 * * *."

Mr. Justice Stewart then pointed out that the rule established in the *Twining* case was reaffirmed many times throughout the ensuing years by Mr. Justice Cardozo in *Snyder v. Massachusetts,* 291 U. S. 97, 105, by Mr. Chief Justice Hughes, writing for a unanimous court reaffirming explicitly *Twining* and *Snyder,* in *Brown v. Mississippi,* 297 U. S. 278, 285, in *Palko v. Connecticut,* 302 U. S. 319, 324, 325, 326, in *Adamson v. California,* 332 U. S. 46, in *Knapp v. Schweitzer,* decided in 1958, 357 U. S. 371, 374, and in *Cohen v. Hurley,* decided in 1961, 366 U. S. 117, 127-129.

Mr. Justice Stewart then said in *Tehan, supra,* at page 457:

"In recapitulation, this brief review clearly demonstrates: (1) For more than half a century, beginning in 1908, the court adhered to the position that the federal Constitution does not require the states to accord the Fifth Amendment privilege against self-incrimination. (2) Because of this position, the court during that period never reached the question whether the federal guarantee against self-incrimination prohibits adverse comment upon a defendant's failure to testify at his trial. Although there were strong dissenting voices, the court made not the slightest deviation from that position during a period of more than 50 years."

Then, at page 458:

"* * * on April 28, 1965, *Griffin v. California* held that the Fifth Amendment 'in its bearing on the states by reason of the Fourteenth Amendment, forbids * * * comment by the prosecution on the accused's silence * * *' (380 U. S., at 615 * * *.)

"There can be no doubt of the states' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in the utmost good faith. Two states amended their constitutions so as expressly to permit comment upon a defendant's failure to testify, Ohio in 1912, and California in 1934. At least four other states followed some variant of the rule permitting comment.

"Moreover, this reliance was not only invited over a much longer period of time, during which the *Twining* doctrine was repeatedly reaffirmed in this court, but was of unquestioned legitimacy as compared to the reliance of the states upon the doctrine of *Wolf v. Colorado,* considered in *Linkletter* as an important factor militating against the retroactive application

> of *Mapp*. During the 11-year period between *Wolf v. Colorado* and *Mapp v. Ohio*, the states were aware that illegal seizure of evidence by state officers violated the federal Constitution. In the 56 years that elapsed from *Twining* to *Malloy*, by contrast, the states were repeatedly told that comment upon the failure of an accused to testify in a state criminal trial in no way violated the federal Constitution."

The rule of law pronounced by the United States Supreme Court in *Griffin, supra,* made invalid a portion of the above-quoted provision of the Ohio Constitution and of Section 2945.43 of the Revised Code allowing adverse comment upon the failure of a defendant in a criminal case to testify.

The majority opinion relies heavily upon the often announced, widely recognized and sound proposition of law that the United States Supreme Court will accord respect to state procedural rules and cites as authority for the majority position *Edelman v. California,* 344 U. S. 357, and *State v. Lynn,* 5 Ohio St. 2d 106.

The question which this court is called upon to determine in this case is a narrow question. It is limited to the fact that this case was tried before *Malloy v. Hogan, Sheriff,* 378 U. S. 1, was decided and was pending on direct appeal in the United States Supreme Court when *Griffin, supra,* was announced. It will serve a good purpose to indicate wherein this question differs from the questions that have been presented in other cases cited by the majority.

Until *Griffin* was decided (April 28, 1965), the controlling law in this case was a part of the Ohio Constitution and the question of substantive law presented by this case had been determined by the highest court in this state and supported by the United States Supreme Court. In *Griffin,* a new rule of substantive law was announced.

Therefore, the question before this court is not the same as that involved in *Edelman* upon which the majority relies. In that case, the constitutionality of a state statute was challenged on appeal in the United States Supreme Court for the first time. The constitutionality of that statute had not been raised in the state court and had not been determined previously by either the state court or the United States Supreme Court, and the United States Supreme Court properly held that it would not entertain jurisdiction of that question because the state's procedural requirement that the question be first raised in a lower state court was an adequate state ground for denying the appeal which the Supreme Court would recognize.

The question in this case is not the same as that before this court in *State v. Lynn,* paragraph six of the syllabus, upon which the majority relies. In that case, the defendant Conti testified, so that he did not claim and, therefore, was not denied the protection of the Fifth Amendment to the United States Constitution, as made applicable to the state by the Fourteenth Amendment, *Malloy v. Hogan, Sheriff,* 378 U. S. 1, and *Griffin, supra.* A codefendant in that trial, Illacqua, did not take the stand and did not testify, and the judge commented adversely upon his failure to testify. This court reversed the Illacqua conviction on authority of *Griffin, supra.* Conti raised in this court for the first time the question of whether the comment by the court upon the failure of the codefendant to testify was, as a matter of law, prejudicial error as to him. This question was not raised in the Court of Appeals, has not been determined by this court, or by the Supreme Court of the United States, and may very well not involve a federal constitutional question under *Griffin, supra,* but may represent only a question

of whether this is prejudicial error under state law.

It is evident that the question in *Lynn, supra,* is a related question but is not the question presented in this case.

Likewise, the question which this court now has to determine is not the same question that was presented in *State v. Davis* (1964), 1 Ohio St. 2d 28. That case was tried several years after *Mapp v. Ohio* (1961), 367 U. S. 643, was decided, and in *Davis* the question was whether defense counsel, in objecting to the evidence on the ground that it should be excluded under the rule in *Mapp* at the trial instead of prior to the trial in accordance with the procedural law of Ohio, had waived a known federal constitutional right of the defendant.

In each of the different kinds of cases enumerated above, there is a legitimate interest and a sound public purpose to be served by a procedural rule which requires that the state courts (trial court, Court of Appeals and Supreme Court) be apprised of the question of law involved and accorded the opportunity to make a determination before that question can be properly presented to the Supreme Court of the United States. A majority of the Supreme Court of the United States, in such cases, has properly said that it will respect the procedural law of a state and accord that state the opportunity to determine the question of constitutionality in the first instance, and, where there is an adequate state procedural ground upon which the state court has refused to review the question, the Supreme Court of the United States will not assert jurisdiction.

In the case before this court, however, unlike any of those cases upon which the majority relies, the question of substantive law had already been determined by the United States Supreme Court and had not been changed

in half a century before the trial. It would not have served a legitimate state interest or public purpose to have required defense counsel in the trial of this case, where that trial took place 5½ months before *Malloy, supra,* was decided, to have objected to the court's charge, which was in accord with the Ohio constitutional provision, Section 10, Article I, and which had been found by the United States Supreme Court not to deny any federal constitutional right of the defendant.

Until *Griffin* was decided, it would not have served any legitimate state interest or any sound public purpose to have required defense counsel to have raised a question about this charge denying the defendant's federal constitutional rights under the Fifth and Fourteenth Amendments in the Court of Appeals, or in this court, for each of those courts would have been required to and would have followed the Ohio constitutional provision, Section 10, Article I. In fact, that point is not open to question because in *State v. Howell,* 4 Ohio St. 2d 11, this court held that there was no substantial constitutional question presented and disallowed the appeal. *Howell, supra,* was remanded to this court by the Supreme Court of the United States, and then reversed by this court in accordance with *Griffin, supra.* In *Howell, supra,* this court announced the proper rule of law and the rule which should be followed in this case.

This court also followed that rule in *State v. Browning* (1965), 38 Ohio Bar No. 45, 1256; *State v. Reed* (1965), 38 Ohio Bar No. 45, 1256; and *State v. Lynn* (1966), 5 Ohio St. 2d 106, paragraph two of the syllabus, with respect to defendant Illacqua.

It may well be, as Taft, C.J., argues, that after *Malloy, supra,* was announced, which occurred at the time this case was pending in the state Court of Appeals, an astute

lawyer would have anticipated the decision in *Griffin*, but to have raised this question based upon such an anticipation would have been a vain and meaningless gesture because the state court was bound by the state Constitution until the Supreme Court of the United States declared that that state constitutional provision denied a federal constitutional right of the defendant. No legitimate state interest or public purpose would be served by requiring defendant to raise the question at that time in order to secure what the United States Supreme Court later determined was a federal constitutional right to which he was entitled.

In a case such as *Edelman* or *Lynn*, or the other cases cited by the majority, it is true that an orderly administration of justice and a proper regard for the support of the federal system make it appropriate for the Supreme Court of the United States to decline jurisdiction where the question of whether a federal constitutional right exists, and, if it does, whether it is impaired by a state constitutional or statutory provision or whether if it exists it has been waived by defendant, has not been determined by the Supreme Court of the United States and has not been presented to the trial court or a lower state appellate court before it reached the Supreme Court of the United States.

This rule then serves a legitimate state interest and a sound public purpose.

In this case, however, the substantive law at all times, that is, before *Malloy* and *Griffin*, and after *Griffin*, had been determined by the United States Supreme Court. No factual determinations are involved, only the constitutional provision and the court's charge. No question of waiver is involved because the trial occurred 5½ months before *Malloy, supra*, was decided, and the case was al-

ready pending in the United States Supreme Court at the time *Griffin, supra,* was decided.

It is unmistakably clear that prior to *Griffin* an Ohio trial court could charge, in accordance with the provisions of the Ohio Constitution, Section 10, Article I, that this had been held not to be a denial of a federal constitutional right of a defendant; but, after *Griffin,* it is equally clear that if an Ohio trial court charges in accordance with the provisions of the Ohio Constitution, Section 10, Article I, the defendant in such a case is denied his federal constitutional right.

To state that an objection at the trial court or state appellate court level prior to *Griffin* would have permitted the lower court the opportunity to pass upon this question is, of course, not accurate and such objection would have served no purpose because such court would have been required to uphold the Ohio constitutional provisions as not in conflict with the United States Constitution on the basis of the then existing decisions of the United States Supreme Court.

For this court to insist upon such a rule, just for the sake of a rule, which would require such an objection to be made at a time when, until *Malloy, supra,* the United States Supreme Court had held that no federal constitutional right of the defendant was abridged by the charge, would, as the United States Supreme Court said in *Wright v. Georgia,* 373 U. S. 284, 291, decided May 20, 1963, " 'be to force resort to an arid ritual of meaningless form.' " See, also, *Staub v. City of Baxley,* 355 U. S. 313, 320; *Henry v. Mississippi,* 13 L. Ed. 2d 408.

Such a position can not be justified on the basis of serving a legitimate state interest or on the basis of establishing a sound public policy when its only result is to

deny to a defendant a federal constitutional right to which the United States Supreme Court has already determined that he is entitled as a matter of substantive law.

In *Henry v. Mississippi, supra,* Mr. Justice Brennan, writing for the majority of the court said, at page 412:

> "* * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. * * *
>
> "* * *
>
> "* * * These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. * * *"

The facts of this case bring it squarely within the *Griffin* rule.

Mr. Justice Stewart in *Tehan, supra,* said, at page 461:

> "We have proceeded upon the premise that 'we are neither required to apply, nor prohibited from applying, a decision retrospectively.' *Linkletter v. Walker,* 381 U. S., at 629 * * *."

The United States Supreme Court decided in *Tehan, supra,* that *Griffin* should be applied to cases pending on direct appeal at the time of the announcement of that decision. This is controlling and I would, therefore, reverse the judgment of the Court of Appeals and remand the cause to the Common Pleas Court for a new trial.

HERBERT and BROWN, JJ., concur in the foregoing dissenting opinion.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed July 30, 1964.)

C. A. No. 5850.

IN THE COURT OF APPEALS OF
LUCAS COUNTY, OHIO.

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JOHN PATRICK O'CONNOR,
Defendant-Appellant.

This cause came on to be heard on the appeal, on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas, Lucas County, Ohio, and was argued by counsel for the parties. Upon consideration, the court finds no error prejudicial to the appellant and, therefore, the judgment of the Court of Common Pleas of Lucas County, Ohio, is affirmed.

It is, therefore, ORDERED, that appellee recover of appellant its costs herein taxed. It is further ordered that a mandate issue out of this Court directing the Court of Common Pleas of Lucas County, Ohio to carry this judgment into execution.

To all of which appellant, by his counsel, excepts.

/s/ CLYDE L. DEEDS, *Judge*
/s/ LEHR FESS, *Judge*
/s/ DUDLEY F. SMITH, *Judge*

APPROVED:

/s/ ANTHONY G. PIZZA,
Asst. Prosecuting Attorney,
on behalf of the State of Ohio.

/s/ JAMES W. COWELL,
Attorney for Appellant.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

No. 39119.

STATE OF OHIO,
CITY OF COLUMBUS.

1966 Term, to wit: Wednesday, May 25, 1966.

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JOHN P. O'CONNOR,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR LUCAS COUNTY.

Thereupon this cause came on for further consideration of the opinion of The Supreme Court of the United States. On consideration whereof, it is ordered and adjudged that the judgment of this Court dismissing the appeal by no substantial constitutional question being involved, be and the same hereby is vacated and set aside and it is now ordered and adjudged that the judgment of the Court of Appeals is affirmed in accordance with the opinion of the Supreme Court of the United States.

It is ordered and adjudged also that the appellee recover from the appellant his costs as taxed on the Mandate from the Supreme Court of the United States and his costs expended in this Court, the Court of Appeals and Court of Common Pleas shall abide the final judgment; that a mandate be sent to the Court of Common Pleas of Lucas County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals _____ County for entry.

(Clerk's certificate omitted.)

MANDATE OF THE SUPREME COURT OF THE STATE OF OHIO, DATED MAY 25, 1966.

(No. 39119—caption omitted.)

To the Honorable Court of Common Pleas.

Within and for the County of Lucas, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Pursuant to the Order of the Supreme Court of the United States, it is ordered and adjudged that the judgment of this Court of December 16, 1964, be, and the same hereby is set aside. It is further ordered that the judgment of the Court of Appeals for Lucas County be, and the same hereby is, affirmed in accordance with the opinion of The Supreme Court of the United States.

THOMAS L. STARTZMAN,
Clerk.

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DENYING REHEARING, DATED JUNE 15, 1966.

(No. 39119—caption omitted.)

It is ordered by the court that rehearing in this case is denied.

(Clerk's certificate omitted.)

STAY OF EXECUTION.

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1966

JOHN P. O'CONNOR,
Appellant,

vs.

OHIO.

ORDER.

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the execution and enforcement of the judgment of the Supreme Court of Ohio be, and the same is hereby, stayed pending the timely filing of an appeal in this Court. Should the appeal be dismissed or the judgment summarily affirmed or reversed, this stay is to terminate automatically. In the event the Court agrees to hear oral argument, this stay is to remain in effect pending the issuance of the mandate of this Court.

This stay is conditioned upon the posting and approval of a good and sufficient bail bond in the sum of Twenty-five Hundred ($2500.00) Dollars. Said bond is to be posted with, and approved by the Supreme Court of Ohio, or a judge thereof, and when so posted and approved to be filed with the clerk of that Court.

/s/ WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 12th
day of July, 1966.

APPROVAL OF BOND BY THE SUPREME COURT OF OHIO, DATED JULY 20, 1966.

(No. 39119—caption omitted.)

The defendant appellant having filed with the Supreme Court of Ohio a bail bond in the sum of Twenty-five Hundred Dollars ($2500.00), in accordance with the order of the Supreme Court of the United States, it is hereby ordered that such bail bond be, and hereby is approved and filed in the Supreme Court of Ohio.

KINGSLEY TAFT,
Chief Justice.

No. 477

Office-Supreme Court, U.S.
FILED
OCT 11 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

JOHN P. O'CONNOR,	:	October Term, 1966
Petitioner	:	U.S. S.C. No. 477
-vs-	:	O.S.C. No. 39119
THE STATE OF OHIO,	:	C.A. No. 5850
Respondent	:	C.P. No. 41973

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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THE STATE OF OHIO,	:	C.A. No. 5850
Respondent	:	C.P. No. 41973

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The question to be decided in this matter is whether the Supreme Court of Ohio may properly refuse to consider a claim of error that was not raised in any way in the trial court or the Court of Appeals and was not considered or decided by the Supreme Court of Ohio.

The Supreme Court of Ohio, by its decision in this case, *6 O.S. 2d pp 169* has decided this question in the affirmative basing its decision on the rules of the Supreme Court of the United States which are based upon the constitutional (Section 2, Article III) and statutory (Section 1257, Title 28, U.S. Code) provisions defining and limiting the appellate jurisdiction of that court. For example, in Rule 23, 1 (F), of the Supreme Court, relative to petitions for certiorari, the petitioner is required to "show that the federal question was timely and properly raised so as to give this

Court jurisdiction to review the judgment of Writ of Certiorari," and Rule 16, 1 (b) provides that "the court will receive a motion to dismiss an appeal from the state court on the ground * * * that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

The Supreme Court of Ohio further based its decision relying on footnote nine (9) of Mapp v. Ohio 367 U.S. 643, wherein it was stated:

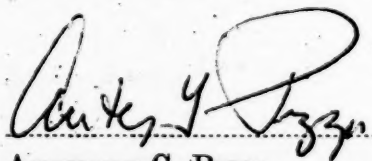
> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

The Opinion, as written by Chief Justice Taft, *6 O.S. 2d 169*, cannot be improved upon by this writer. This writer adopts the majority opinion in said case in total.

For the foregoing reasons, the petition of the petitioner for Writ of Certiorari should be denied.

Respectfully submitted,

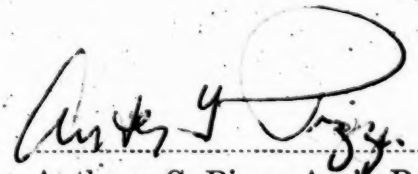
HARRY FRIBERG,
Prosecuting Attorney



ANTHONY G. PIZZA,
Ass't. Prosecuting Attorney
Lucas County, Ohio

CERTIFICATION

This is to certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed, via U. S. Mail, to James W. Cowell, Counsel for Petitioner, 362 Spitzer Building, Toledo, Ohio, this 3rd day of October, 1966.



Anthony G. Pizza, Ass't. Prosecuting Atty.